

Government of the District of Columbia

ZONING COMMISSION



Zoning Commission Order No. 601-B

Case No. 88-24M/77-16F

(PUD Modification - Rafferty)

June 14, 1993

ORDER ON REMAND

Procedural Background

1. Pursuant to notice, a public hearing of the Zoning Commission for the District of Columbia was held on November 3 and 7, 1988, to consider the application of Angene G. Rafferty and Joseph R. Rafferty for modification to the architectural plans of a previously approved planned unit development (PUD), pursuant to Chapter 24 of the District of Columbia Municipal Regulations (DCMR), Title 11, Zoning. The previously approved PUD was authorized by Zoning Commission Order No. 195. The public hearing was conducted in accordance with the provisions of Section 3022 of that title. By Zoning Commission Order No. 601, which became final on February 10, 1989, the Commission denied the application. Applicant thereafter filed a timely petition for review by the District of Columbia Court of Appeals.
2. This application is before the Commission pursuant to the decision of the District of Columbia Court of Appeals, which remanded the case to the Commission for further proceedings consistent with the opinion of the court dated December 3, 1990.
3. By letter dated January 29, 1991, the Commission requested the applicants and other parties to submit in writing their positions about the procedure by which the Commission should resolve the outstanding issues in this case.
4. By various letters, the applicants and the parties in opposition submitted their positions. By memorandum dated May 10, 1991, the then Executive Director of the Zoning Secretariat submitted a recommendation to the Commission. The Commission considered all submissions and the recommendation of the then Executive Director. In Z.C. Order No. 601-A, Preliminary Order on Remand, the Zoning Commission set forth its findings of fact, conclusions of law, and determined that the only issues which would require

further hearing are laches and estoppel. Zoning Commission Order No. 601-A also constituted the Commission's order to hear this case.

5. Pursuant to notice to all parties and the applicant, public hearing sessions in this case were held on October 24, 1991, November 21, 1991, March 16, 1992, and May 28, 1992, to consider the issues of estoppel and laches. The public hearings were conducted in accordance with the provisions of Section 3022 of Title 11, District of Columbia Municipal Regulations, and the Zoning Commission's Rules of Practice and Procedure.

Findings of Fact

1. As a preliminary matter for purposes of the limited scope of the further hearings, and upon a request for substitution of parties, the Zoning Commission granted party status to Eleanor Conway after the withdrawal of the original party opponents, Kyle and Kimberly Samperton. Mrs. Conway shares a party fence with the applicants, and participated in the 1988 proceedings before the Commission in this case.
2. The Court erroneously stated that the Zoning Commission had raised the issues of estoppel and laches at a previous hearing. The issues were briefly considered at the August 8, 1988 setdown public meeting, but never discussed during the 1988 public hearing proceedings.
3. However, in considering the estoppel claims, the Zoning Commission must review this case in light of the elements of estoppel: a) expensive and permanent improvements; b) made in good faith; c) in justifiable and reasonable reliance upon; d) affirmative acts of District government officials; e) without notice that the improvements may violate the Zoning Regulations; and f) the equities strongly favor the petitioners.
4. The Commission finds that the improvements constructed prior to the revocation of the building permit cannot be characterized as either expensive or permanent. The applicants had begun construction, however, that construction was not substantial, and after the stop work order was issued, all construction ceased. With the Zoning Administrator's permission, the applicants stabilized the foundation and made the area safe. The concrete foundation has been poured and there are approximately two layers of brick in place around the foundation. The Commission further finds that the equities do not favor the applicants -- all other purchasers were aware of the PUD restrictions, and the

evidence reflects that the applicants were treated the same as other purchasers and were provided documentation referencing the PUD restrictions. The Commission finds that the applicants reasonably relied on the affirmative act of District government officials in the issuance of the building permit, but that their reliance was not detrimental because documentation in their possession referenced PUD restrictions that should have put them on notice that improvements could violate the Zoning Regulations.

5. The Commission finds that it is not within their jurisdiction to inquire into alleged irregularities in the proceedings of other agencies. However, the Zoning Commission has received and reviewed a copy of the by-laws of Advisory Neighborhood Commission (ANC) 3D. The Zoning Commission found no irregularities in the process and finds that it properly gave great weight to the position of ANC 3D in Zoning Commission Order No. 601.
6. The applicants did not preserve the issue of laches for consideration by the Zoning Commission because it was not brought up during the 1988 public hearing proceedings. The issue came up during a public meeting of the Zoning Commission to consider whether the application had sufficient merit to warrant a public hearing.
7. Even though the applicants did not preserve the laches claim, the Commission finds that laches does not apply because affected property owners contested the applicants' building permit as soon as they became aware of it. Opposition to the applicants' two-story addition was voiced as early as May 1988, and the first gathering of neighbors to discuss the construction plans occurred in early June 1988.
8. Original and subsequent purchasers of property within the PUD were provided the covenants which contain the PUD restrictions at the time of sale by the project developer. The applicants contend that they did not know about the PUD restrictions. Original and subsequent purchasers understood that a PUD modification process was necessary to make external changes to their homes.
9. A copy of the applicants' "Policy of Title Insurance" submitted by the applicants, as requested by the Commission, makes references to covenants in four exceptions in the document, all of which are recorded in the land records of the District of Columbia: a) Covenant by and between W.C. and A.N. Miller Development Company and the District of Columbia dated June 23, 1978; b) Declaration of Covenants

dated November 13, 1978; c) Declaration of Covenants dated December 26, 1978; and d) Addendum to Declaration of Covenants dated February 8, 1980.

10. The documents submitted by the party opponent (purchase agreements and title reports from Spring Valley purchasers) are typical and clearly indicate the existence of protective covenants. The applicants signed a contract identical to those signed by original owners which referenced the "protective covenants".
11. The developer, W.C. and A.N. Miller Development Company ("Miller"), submitted PUD plans for the record of this case as requested by the Commission. The plans were transmitted to the Zoning Administrator to do an on-site inspection to determine if what was actually built and what the plans show are the same.
12. The Zoning Administrator testified that the plans submitted definitely relate to the development that is the subject of the PUD. There are minor deviations that do not change the character of the overall development. There were a couple of decks and sliding doors and changes in the number of windows, but there were no instances of any addition of living space to units within the PUD. The applicants' proposed addition includes living space and went beyond the scope of the Zoning Administrator's discretion.
13. It is uncontested that the developer made numerous changes to the applicants' home one of which may have included bricking up a window. However, these changes are considered minor and do not change the character of the structure, nor add additional living space.

CONCLUSIONS OF LAW

1. The subject application is being processed as a modification to a previously approved PUD.
2. The PUD process is an appropriate means of controlling development of the subject site, since control of the use and site plan is essential to insure compatibility with the neighborhood. Approval of this proposed modification would be inconsistent with the Article 75 Covenant recorded in this case.
3. Approval of the application would not further the general public welfare nor serve to stabilize or improve the area. Approval of the proposed modification would have an adverse impact on the surrounding community and will not promote

orderly development with the entirety of the District of Columbia zone plan as embodied in the Zoning Regulations and Map of the District of Columbia.

4. Approval of the modification would be inconsistent with the spirit and intent of Zoning Commission Order No. 195.
5. The proposed modification would not carry out the purposes of the PUD process, as set forth in the Zoning Regulations.
6. Advisory Neighborhood Commission (ANC) - 3D did not act improperly and is therefore accorded the "great weight" to which it is entitled.
7. The applicants did not meet the tests of estoppel. The improvements to the property are not expensive or permanent. Although the applicants reasonably relied on the affirmative acts of District government officials, that reliance was not fully justifiable because they had documentation in their possession referencing protective covenants and PUD restrictions. The equities strongly favor the other PUD residents who have abided by the PUD restrictions.
8. The doctrine of laches is not applicable in this case because the neighbors expressed their objections to the construction as soon as they became aware of the applicant's intentions.
9. The applicants knew or should have known about the existence of the PUD and the associated restrictions and covenants filed in the land records of the District of Columbia.

Decision

In consideration of the findings of fact and conclusions of law set forth herein, the Zoning Commission for the District of Columbia, on remand from the District of Columbia Court of Appeals, hereby orders DENIAL of the application in Case No. 88-24M/77-16F, which requests a modification to Zoning Commission Order No. 195.

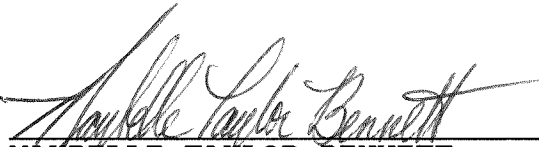
Vote of the Zoning Commission taken at the special public meeting held on July 30, 1992: 3-0 (John G. Parsons, Maybelle Taylor Bennett, and William L. Ensign to deny - Lloyd D. Smith, not present, not voting; Tersh Boasberg, not present, not voting, having recused himself from the case).

This order was adopted by the Zoning Commission at the public meeting held on June 14, 1993, by a vote of 3-0: (John G. Parsons, Maybelle Taylor Bennett, and William Ensign to adopt;

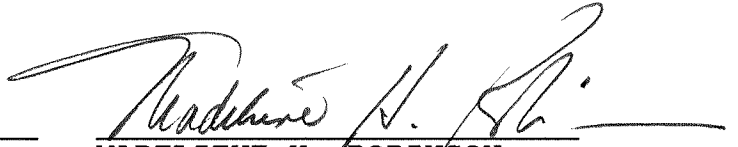
Z.C. ORDER NO. 601-B
CASE NO. 88-24M/77-16F
PAGE 6

Lloyd D. Smith, not present not voting; Tersh Boasberg, not voting, having recused himself from the case).

In Accordance with 11 DCMR, Section 3028, this order is final and effective upon publication in the D.C. Register; that is on _____
JUN 25 1993.



MAYBELLE TAYLOR BENNETT
Chairperson
Zoning Commission



MADELIENE H. ROBINSON
Director
Office of Zoning

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